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Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/769,294

Applicant(s)

JOHNSON, RONALD FREDRIK
MICHAEL

Examiner

Andrew J. Fischer

Art Unit

3627

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 06 October 2004.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-19 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-19 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____.

DETAILED ACTION

Acknowledgements

1. Applicant's amendment filed October 6, 2004 is acknowledged. Accordingly, claims 1-19 remain pending.
2. All references in this Office Action to the capitalized versions of "Applicant" refers specifically the Applicant of record. References to lower case versions of "applicant" or "applicants" refers to any or all patent "applicants." Unless expressly noted otherwise, references to "Examiner" in this Office Action refers to the Examiner of record while reference to or use of the lower case version of "examiner" refers to examiner(s) generally.
3. This Office Action is written in OACS. Because of this, the Examiner is unable to control formatting, paragraph numbering, font, spelling, line spacing, and/or other word processing issues. The Examiner sincerely apologies for these errors.

Claim Rejections - 35 USC §101

4. 35 U.S.C. §101 reads as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

5. Claims 12-19 are rejected under 35 U.S.C. §101 because the claimed invention is directed to non-statutory subject matter. The basis of this rejection is set forth in a two-prong test:

- (1) The invention must be within the technological arts; and
- (2) The invention must produce a useful, concrete, and tangible result.

6. Prong (1) requires the claimed invention to be within the technological arts. See *In re Musgrave*, 431 F.2d 882, 167 USPQ 280, 289-90 (C.C.P.A. 1970); and *In re Johnston*, 502 F.2d

Art Unit: 3627

765, 183 USPQ 172, 177 (C.C.P.A. 1974). Mere abstract ideas (*i.e.*, laws of nature, natural phenomena) that do not apply, involve, use, or advance the technological arts fail to promote the “progress of science and the useful arts”¹ and are therefore non-statutory subject matter.²

For a process, the claimed process must somehow apply, involve, use, or advance the technological arts. Mere intended or nominal use of a component—albeit within the technological arts—does not confer statutory subject matter to an otherwise abstract idea if the component does not apply, involve, use, or advance the underlying process. In other words, if the invention in the body of the claim is not tied to a technological art, environment, or machine, the claim is non-statutory. *Ex parte Bowman*, 61 USPQ2d 1665, 1671 (B.P.A.I. 2001) (Unpublished). See also MPEP §2106 IV B. 2 (b) ii). The Examiner again recommends (by way of example only) positive recitation of a computer or other technology within the body of the claim if the specification supports such an amendment.

Claim Rejections - 35 USC §112 1st Paragraph

7. The following is a quotation of the 1st paragraph of 35 U.S.C. §112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

8. Claims 12-19 are rejected under 35 U.S.C. §112, 1st paragraph, as failing to comply with the written description requirement. The claims contains subject matter which was not described

¹ It is the Examiner’s position that “technological arts” is synonymous with “useful arts” as stated in the U.S. Constitution, Art. I, §8. See *In re Waldbaum*, 457 F.2d 997, 173 USPQ 430, 434 (C.C.P.A. 1972).

² *E.g.*, the physical sciences are statutory; *c.f.*, social sciences which are non-statutory

Art Unit: 3627

in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

9. In claim 12, Applicant appears to be claiming this “decrementing” step on *all* shipments and not just shipments of “reserved” inventory. The Examiner notes that this step requires the decrementing of both “reserve and on hand inventory” even if reserve inventory was not used to fill the order. Applicant’s specification does not disclose such methods.

Claim Rejections - 35 USC §112 2nd Paragraph

10. The following is a quotation of the 2nd paragraph of 35 U.S.C. §112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

11. Claims 2 and 12-19 are rejected under 35 U.S.C. §112, 2nd paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

a. Claim 4 is indefinite. As of the date of Applicant’s response, a restriction is not present in this application. Therefore “withdrawn” is an improper claim modifier.

Applicant must therefore be “cancel” claim 4.

b. In claim 12, the phrase “decrementing both reserve and on hand inventory item totals in the inventory database upon shipment” is indefinite since Applicant appears to be claiming this “decrementing” step on *all* shipments and not just shipments of “reserved” inventory. The Examiner notes that this step requires the decrementing of both “reserve and on hand inventory”

Art Unit: 3627

12. The Examiner finds that because the claims are indefinite under 35 U.S.C. §112 2nd paragraph, it is impossible to properly construe claim scope at this time. See *Honeywell International Inc. v. ITC*, 68 USPQ2d 1023, 1030 (Fed. Cir. 2003) (“Because the claims are indefinite, the claims, by definition, cannot be construed.”). However, in accordance with MPEP §2173.06 and the USPTO’s policy of trying to advance prosecution by providing art rejections even though these claim are indefinite, the claims are construed and the art is applied *as much as practically possible*.

Claim Rejections - 35 USC §102

13. The following is a quotation of the appropriate paragraphs of 35 U.S.C. §102 that form the basis for the rejections under this section made in this Office Action:

A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States. . . .

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

14. Claims 1-19 are rejected under 35 U.S.C. §102(e) as being anticipated by Salvo et. al. (U.S. 6,341,271 B1)(“Salvo”). Salvo discloses a database, communications interface, (attached to server 112); a web server (inherent since connections are Internet based); custom software the software at the site designed to implement monitoring arrangement 101.

15. Claims 1-19 are rejected under 35 U.S.C. §102(b) as being anticipated by Johnson et. al. (U.S. 5,712,989)(“Johnson ‘989”).

Art Unit: 3627

16. Claims 1-19 are rejected under 35 U.S.C. §102(e) as being anticipated by Peterson et. al. (U.S. 6,324,522 B2))("Peterson").

Claim Rejections - 35 USC §103

17. The following is a quotation of 35 U.S.C. §103(a) which forms the basis for all obviousness rejections set forth in this Office Action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

18. Claims 1-19, as understood by the Examiner, are alternatively rejected under 35 U.S.C. §103(a) as being unpatentable over Salvo.³ It is the Examiner's principle position that the claims are anticipated because of the inerencies in Salvo such as "reserved and ordered" inventory information.

19. However if not inherent, it would have been obvious to a person having ordinary skill in the art at the time the invention was made to modify Salvo to include a database that stores on-hand, reserved, and ordered inventory information. Such a modification would have allowed the user in Salvo to better predict their inventory use.

20. Since Applicant did not seasonably traverse the Official Notice statements as stated in the previous Office Action (Paragraph No. 15), the Official Notice statements are taken to be admitted prior art. See MPEP §2144.03.

21. Claims 1-19, as understood by the Examiner, are also alternatively rejected under 35 U.S.C. §103(a) as being unpatentable over Johnson '989. It is the Examiner's principle position

Art Unit: 3627

that the claims are anticipated by Johnson '989 because of the inerencies such as "reserved and ordered" inventory information.

22. However if not inherent, it would have been obvious to a person having ordinary skill in the art at the time the invention was made to modify Johnson '989 to include a database that stores on-hand, reserved and ordered inventory information. Such a modification would have allowed the user in Johnson '989 to better predict their inventory use.

23. Finally, claims 1-19, as understood by the Examiner, are alternatively rejected under 35 U.S.C. §103(a) as being unpatentable over Peterson. It is the Examiner's principle position that the claims are anticipated because of the inerencies in Peterson such as "reserved and ordered" inventory information.

24. However if not inherent, it would have been obvious to a person having ordinary skill in the art at the time the invention was made to modify Peterson to include a database that stores on-hand, reserved, and ordered inventory information. Such a modification would have allowed the user in Peterson to better predict their inventory use.

25. Additionally, if the claimed client and server structure was not inherent, it too would have been obvious to one having ordinary skill in the art at the time the invention was made to modify Salvo (or alternatively Johnson '989) to include the claimed server structure. It is the Examiner's position that absent evidence of new or unexpected results, it is not inventive in terms of patentability to take one or more servers ($S_1, S_2, S_3, \dots S_N$) which perform one or more tasks ($T_1, T_2, T_3, \dots T_N$) and add (or subtract) an additional number of servers (X) to perform all or part of the same tasks by allocating the tasks between the various servers (*i.e.* S_1 and S_{N+1}

³ See MPEP §2112 expressly authorizing alternative §102/§103 rejections when the question of inherency is present in the anticipation rejection.

Art Unit: 3627

perform T_1 ; S_2 and S_{N+2} perform T_2 ; S_3 and S_{N+3} perform T_3 ; ... while S_N and S_{N+X} perform T_N).

The prior art is replete with examples showing why such scaling (both increasing and decreasing the number of servers) is desirable.⁴

In other words, a modification increasing the number of servers (*e.g.* having two servers perform a task previously performed by one server) is analogous to making functions, structures, or actions separable. It is the Examiner's position that when the difference between the claimed invention and the prior art is that the prior art does not disclosed an element as separable, as a matter of law, it would have been obvious to one having ordinary skill in the art to make the element separable. See MPEP §2144.04 V. C. and *In re Dulberg*, 289 F.2d 522, 523, 129 USPQ 348, 349 (CCPA 1961). As noted above, it is desirable to allocate the server tasks to various servers to help reduce bandwidth bottlenecks and to help increase the benefits from economies of scale in addition to offering increased security, excellent data management, fast response, and room for expansion.

Moreover, it is old and well known in the art that storage mediums are configured as databases. See *e.g.* Wolfe et. al. (U.S. 6,282,517 B1) ("Wolfe"):

⁴ See *e.g.* Watson (U.S. 6,223,209 B1) disclosing distributed satellite world wide web servers containing identical information placed strategically throughout the Internet so as to be close to all potential clients to help reduce traffic bottlenecks; Midgely et. al. (U.S. 5,592,611 A) disclosing additional servers as a stand-in for a failed server so that client service requests are transparent to the user; Kriegsman (U.S. 6,370,580 B2) disclosing multiple servers as secondary web servers to optimize file transfers; Burns et. al. (U.S. 6,298,373 B1) disclosing cache servers which download content during off-peak hours to reduce traffic bottlenecks; Stiles (U.S. 6,219,692 B1) which discloses sending essentially identical tasks to multiple servers with differing processing loads to find the most preferred server provider; Zdepski et. al. (U.S. 5,825,884) disclosing an transactional server for TV networks; *How Networks Work*, Chapter 17 describing how server based structures benefit from economies of scale in addition to offering security, excellent data management, fast response, and room for expansion; and *How the Internet Works*, Chapter 44 implementing a server based architecture in Internet e-commerce.

Art Unit: 3627

Those of ordinary skill in the art will recognize that the Data Center programs, the Data Center databases, and gateway functionality may advantageously be implemented on one or more computers. These computers may be uniprocessor or multiprocessor machines. Wolfe, column 6, ~ lines 19-22.

In an alternative embodiment in Wolf, the Data Center storage medium **106** may be configured as a database from which information can be both stored, updated, and retrieved. For example, the database may conform to the SQL standard. In another alternative embodiment, the database may conform to any database standard, or may even conform to a non-standard, private specification. The Data Center programs may provide access to the information stored on the Data Center storage medium **106**. The Data Center storage medium **106** may be accessed by devices such as clients, servers, workstations, personal computers, and the like, connected to the network **102** or the LAN **108**. Wolfe, column 6, ~ lines 43-54.

After careful review of the entire record, especially Applicant's specification, the Examiner finds that Applicant has not asserted any new or unexpected results regarding his particular claimed client-server configuration (and/or the software running this configuration). Absent such new or unexpected results, modifications either increasing or decreasing the number of servers (or computers) or even reassigning tasks to different server(s) (or computers) would have helped maintain benefits from economies of scale in addition to offering increased security, excellent data management, fast response, and room for expansion while reducing both operating and capital costs.

26. Additionally it is the Examiner factual determination that to one of ordinary skill in this art, it is old and well known that bar codes (*e.g.* UPC bar codes) may contain useful information for inventory purposes including but not limited to: date of manufacture; shelf life; place of manufacture; intended distribution route; batch number; government specs; size, weight, color,

Art Unit: 3627

etc.; safety, health, ingredients, precautions, dosages, etc.; information, pricing, discount, commission, tax, and other accounting information; automatic reordering instructions; serial numbers, and so forth. See *e.g.* Storch et. al. (U.S. 5,548,110).

27. Moreover, it is the Examiner's factual determination that bar code tags and radio frequency ("RF") tags are art recognized equivalents. See MPEP §2144.06. Both bar code tags and RF tags are used for the same purpose: conveying information about the article to which the tags are attached to a reader machine. Additionally, one of ordinary skill in the art recognizes that the selection of either a bar code tag over an RF tag (or vice versa, RF tag over a bar code tag) is not enough to distinguish the claimed invention over the prior art since both devices are recognized as interchangeable depending upon their intended use or the particular environment in which the tag will be used. See MPEP §2144.07. Evidence to support these conclusions includes but is not limited to Rakers et. al. (U.S. 6,763,996 B2); Keys et. al. (U.S. 6,758,403 B1); Monico (U.S. 6,557,758 B1); McAllister (U.S. 6,415,978 B1); Helton et. al. (U.S. 6,357,662 B1); Maloney (U.S. 6,232,876 B1); Rupport et. al. (U.S. 5,640,002); Kewin (U.S. 5,595,356); Eberhardt (U.S. 5,28,784); and Scribner et. al. (U.S. 4,688,026).

28. The Examiner concludes that Applicant has decided not to be his own lexicographer by indicating and defining claim limitations to have meanings other than their ordinary and accustomed meanings. To support this position, the Examiner relies on the following factual findings. First and as noted in the previous Office Action,⁵ the Examiner has carefully reviewed the specification and prosecution history and can not locate any lexicographic definition(s). Second, the Examiner finds that not only has Applicant not pointed to definitional statements in

⁵ See the Examiner's previous Office Action mailed April 7, 2004, Paragraph No. 16.

Art Unit: 3627

his specification or prosecution history with the exception of “client” and “Internet,” Applicant has also not pointed to a term or terms in a claim with which to draw in those statements⁶ with the required clarity, deliberateness, and precision.⁷ Third, after receiving express notice in the previous Office Action of the Examiner’s position that lexicography is not invoked⁸ and with the exception of “client” and “Internet,” Applicant has not pointed out the “supposed errors” in the Examiner’s position regarding lexicography invocation in accordance with 37 C.F.R. §1.111(b) (*i.e.* Applicant has not argued lexicography is invoked). Finally and to be sure of Applicant’s intent, the Examiner also notes that Applicant has declined the Examiner’s express invitation⁹ to be his own lexicographer.¹⁰ Accordingly and for due process purposes, the Examiner gives notice that for the remainder of the examination process (and unless expressly noted otherwise

⁶ “In order to overcome this heavy presumption in favor of the ordinary meaning of claim language, it is clear that a party wishing to use statements in the written description to confine or otherwise affect a patent’s scope must, *at the very least*, point to a term or terms in the claim with which to draw in those statements. [Emphasis added.]” *Johnson Worldwide Assocs. v. Zebco Corp.*, 175 F.3d 985, 989, 50 USPQ2d 1607, 1610 (Fed. Cir. 1999).

⁷ “The patentee’s lexicography must, of course, appear ‘with reasonable clarity, deliberateness, and precision’ before it can affect the claim.” *Renishaw PLC v. Marposs Societa’ per Azioni*, 158 F.3d 1243, 1249, 48 USPQ2d 1117, 1121 (Fed. Cir. 1998) citing *In re Paulsen*, 30 F.3d 1475, 1480, 31 USPQ2d 1671, 1674 (Fed. Cir. 1994).

⁸ See again the Examiner’s previous Office Action, Paragraph No. 16.

⁹ *Id.*

¹⁰ The Examiner’s requirements on this matter were reasonable on at least two separate and independent grounds. First, the Examiner’s requirements were simply an express request for clarification of how Applicant intend his claims to be interpreted so that lexicography (or even an *attempt* at lexicography) by Applicant was not inadvertently overlooked by the Examiner. Second, the requirements were reasonable in view of the USPTO’s goals of compact prosecution, productivity with particular emphasis on reductions in both pendency and cycle time, and other goals as outlined in the USPTO’s The 21st Century Strategic Plan, February 3, 2003 available at www.uspto.gov/web/offices/com/strat21/index.htm (last accessed December 31, 2004).

Art Unit: 3627

by the Examiner), the heavy presumption in favor of the ordinary and accustomed meaning is not overcome; the claims therefore continue to be interpreted with their “broadest reasonable interpretation” *In re Morris*, 127 F.3d 1048, 1054, 44 USPQ2d 1023, 1027 (Fed. Cir. 1997).¹¹ The Examiner now relies heavily and extensively on this interpretation.¹² Unless expressly noted otherwise by the Examiner, the preceding claim interpretation principles in this paragraph apply to all examined claims currently pending.

29. Under the broadest reasonable interpretation standard noted above and unless modified in this Office Action, the Examiner maintains his interpretations including the statements and/or definitions of claim limitations as noted in previous Office Action. Those previous definitions are part of the administrative record and, in accordance with *In re Morris*, are provided simply as a factual source to support the Examiner’s claim interpretations (and ultimately the Board of Patent Appeals and Interferences¹³ claim interpretations) during ex parte examination.

30. Finally, the Examiner notes that “the PTO and the CCPA acknowledged product-by-process claims as an exception to the general rule requiring claims to define products in terms of structural characteristics.” *Atlantic Thermoplastics Co. v. Faytex Corp.*, 970 F.2d 834, 845, 23

¹¹ See also *In re Bass*, 314 F.3d 575, 577, 65 USPQ2d 1156, 1158 (Fed. Cir. 2002) (“In examining a patent claim, the PTO must apply the broadest reasonable meaning to the claim language, taking into account any definitions presented in the specification. Words in a claim are to be given their ordinary and accustomed meaning unless the inventor chose to be his own lexicographer in the specification”) (citations omitted); *In re Etter*, 756 F.2d 852, 858, 225 USPQ 1, 5 (Fed. Cir. 1985) (en banc); and MPEP §§ 2111 and 2111.01.

¹² See 37 C.F.R. §1.104(c)(3) which states in part: “the examiner may rely upon admissions by applicant . . . as to *any matter* affecting patentability [Emphasis added.]”

¹³ See *Gechter v. Davidson*, 116 F.3d 1454, 1460, 43 USPQ2d 1030, 1035 (Fed. Cir. 1997) (“[W]e hold that the Board is required to set forth in its opinions specific findings of fact and conclusions of law adequate to form a basis for our review.”).

Art Unit: 3627

USPQ2d 1481, 1490 (Fed. Cir. 1992) (hereinafter "*Atlantic Thermoplastics v. Faytex I*").

Furthermore, the Federal Circuit "acknowledges that it has in effect recognized . . . product-by-process claims as exceptional." *Atlantic Thermoplastics v. Faytex I*, 970 F.2d at 847, 23

USPQ2d at 1491.

Because of this exceptional status, the Examiner has carefully reviewed the claims and it is the Examiner's position that claims 12-19 *do not* contain any product-by-process limitations whether in a conventional format or otherwise. If Applicant disagrees with the Examiner, the Examiner respectfully requests Applicant in his next response to expressly point out any product-by-process claim(s) and their limitations so that they may be afforded their exceptional status and treated accordingly. Applicant is reminded that "even though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself." *In re Thorpe*, 777 F.2d 695, 697, 227 USPQ 964, 966 (Fed. Cir. 1985) (citations omitted).¹⁴ Failure by Applicant in his next properly filed response to also address this issue in accordance with 37 C.F.R. §1.111(b) or to be non-responsive to this issue entirely will be considered intent by Applicant *not* to recite any product-by-process limitations.

Response to Arguments

31. Applicant's arguments filed with his claim amendments have been fully considered but they are not persuasive.

32. As a starting point and in reference to electronic commerce systems, it is the Examiner's factual determination that web based electronic commerce systems are old and very well known

¹⁴ See also MPEP §2113.

Art Unit: 3627

in the art. Evidence to support this finding includes *e.g.* Wong (U.S. 6,115,690 A), Chen et. al. (U.S. 5,590,197 A)(“Chen”), and Anderson (U.S. 5,706,442). These disclosures exemplify basic features that are well within the knowledge of one of ordinary skill in this art.

33. Applicant’s arguments with respect to Salvo have been considered but are not persuasive. Applicant also argues that “the Salvo does not teach or suggest pushing inventory information to a client, as recited in Applicant’s independent claims 1 and 12.”¹⁵ With respect to claim 1, “pushing inventory information to a client” is not found in the claim. As Judge Clevenger has so eloquently summarized these types of arguments, “The invention disclosed in [Applicant’s] written description may be outstanding in its field, but the name of the game is the claim.” *In re Hiniker Co.*, 150 F.3d 1362, 1369, 47 USPQ2d 1523, 1529 (Fed. Cir. 1998).

34. With respect to claim 12, it is the Examiner’s factual determination that “push-pull technology” is old and well known in the art and well within the knowledge of one of ordinary skill in this art. See *e.g.* O’Leary et. al. (U.S. 6,609,113 B1), Lin et. al. (U.S. 2001/0052015 A1), or Cantone et. al. (U.S. 6,351,761).

35. Applicant next argues “that the Peterson reference does not enable one of ordinary skill in the art to disseminate inventory information in real time.”¹⁶ First, it is unclear if Applicant is arguing (1) that Peterson does disclose the disseminating information in real time, or (2) the limitations at issue are disclosed but not in an enabling manner. Applicant’s arguments lack focus and are imprecise. If Applicant persists with this argument in his next appropriately filed response, clarification is required.

¹⁵ Applicant’s Remarks/Arguments” filed October 6, 2004, Page 14, 2nd full ¶.

¹⁶ Applicant’s Remarks/Arguments” filed October 6, 2004, Page 8, last ¶.

Art Unit: 3627

36. In any event, should Applicant clarify his position and articulate one, the other, or even both arguments, it is the Examiner's position that both such arguments are ultimately not persuasive. Regarding the first, the Examiner notes that Peterson directly discloses the following:

It should also be noted that much of the Inventory Network function discussed herein, like other functions of the information network process 100, are described as batch functions, rather than real time transactions. That is, as will be discussed below, a vendor will periodically generate a computer file containing a listing of the vendor's inventory, and upload that file to the information network, where it is merged with other vendors' files to generate a picture of the inventory available in the entire distributor network which participates in the inventory network. However, it is specifically contemplated, and within the scope of the invention, that such functions could be done in a real time fashion. Peterson, Column 14, ~lines 23-36.

However, it is specifically contemplated, and within the scope of the invention, that such functions be replaced with a real time connection to the inventory control system that resides at the vendor's locality. Peterson, Column 43, ~lines 15-31.

37. In light of these statements and the rest of the disclosure in Peterson, it is the Examiner's factual determination that Peterson directly discloses disseminating inventory information in real time.

38. Regarding Applicant's second plausible argument of enablement, issue patents have a presumption of validity. See 35 U.S.C. §282. Lack of enablement in an issued patent must be proven by clear and convincing evidence. See *e.g. Morton Int'l, Inc. v. Cardinal Chem. Co.*, 5 F.3d 1464, 28 USPQ2d 1190, 1194 (Fed. Cir. 1993) ("At trial, [the defendant] had the burden of proving by clear and convincing evidence facts establishing lack of enablement . . .") and *Panduit Corp. v. Dennison Mfg. Co.*, 810 F.2d 1561, 1570, 1 USPQ2d 1593, 1595 (Fed. Cir. 1987) (stating that the presumption mandated by §282 is applicable to all of the many bases for challenging a patent's validity). The Examiner finds that because Applicant has not presented

Art Unit: 3627

any evidence of a lack of enablement, let alone the clear and convincing evidence required to rebut the presumption of an enabling disclosure, Applicant's arguments on this matter are not persuasive.

39. Applicant also argues that "[c]learly, real time inventory dissemination was not known to one of ordinary skill in the art as of the priority date of this application."¹⁷ Applicant cites a September 20, 2004 article in Information week ("Gallo"). However, because Gallo is dated at least three (3) years *after* the priority date of the application, and because this art changes rapidly (as evidenced by the scope and content of the prior art of record), Gallo does not reflect the knowledge of one of ordinary skill in the art at the time of application. For this reason alone, Applicant's arguments are not persuasive.

40. Yet even if a reviewing body finds that Gallo somehow supports Applicant's position (that real time inventory dissemination was not known to one of ordinary skill in the art at the time of the effective filing date), the Examiner finds that based upon a preponderance of evidence, it is the Examiner's factual determination that real time inventory dissemination *is* old and well known in the art. In such a case, evidence to rebut Gallo includes¹⁸ at least: Salvo, Peterson, Radican (U.S. 6,148,291); Dinkins (U.S. 5,737,363); Johnson et. al. (U.S. 5,712,989); Cantone et. al. (U.S. 6,351,761); Colburn et. al. (U.S. 5,533,079); Dinkins (U.S. 5,481,546); Tuma et. al. (U.S. 5,471,867); Swartz (U.S. 5,448,046); Colburn et. al. (U.S. 5,404,384); Dinkins (U.S. 5,388,101); and Zachar et. al. (U.S. 3,686,637).

¹⁷ Applicant's Remarks/Arguments" filed October 6, 2004, Page 9, last sentence in the first full ¶.

¹⁸ The Examiner notes that (unlike Gallo) these references actually have effective filing dates *before* and *prior to* Applicant's effective filing date.

41. Applicant also argues that “the Peterson reference does not teach or suggest pushing inventory information to a client, as recited in Applicant’s independent claims 1 and 12.”¹⁹

Again and with respect to claim 1, pushing inventory information to a client” is not found in the claim. Regarding claim 12, see the arguments above pertaining to Salvo.

42. Regarding inherency, it is the Examiner position that inherent elements in the prior art—like directly disclosed elements in the prior art—must be shown by a preponderance of the evidence.

43. Applicant’s traversal of the definitions stated by the Examiner is acknowledged and noted for the record. The Examiner respectfully disagrees with Applicant’s statements and arguments on this matter.

44. Applicant also argues that “such definitions constitute an attempt by the Examiner to construe the scope of the claims, and such construction is the province of the courts after a Markman style hearing.”²⁰ Applicant’s response is ... novel. For a better understanding of the patent prosecution process, see *e.g.* Donner, Irah H., Patent Prosecution, Practice & Procedure Before the U.S. Patent Office, 2nd Ed., Chapter 2 II, titled, “Overview of the Examination Process” for an overview of the examination process.

45. Moreover, how does Applicant believe the Examiner can apply the prior art to the claims without first “construing” the claims? How does an examiner determine compliance with statutory provisions such as 35 U.S.C. 112 2nd paragraph if she or she does not construe the claims? If an applicant, for example, during ex parte examination successfully invokes 35 U.S.C. 112 6th paragraph, Applicant’s arguments suggest that the examiner should not construe

¹⁹ Applicant’s Remarks/Arguments” filed October 6, 2004, Page 10, last ¶.

Art Unit: 3627

the claims according to the required three (3) prong analysis as set forth in MPEP §2181. Such reasoning is clearly incorrect. In fact, *Morris* requires examiners to provide a basis for how they are interpreting the claims.

46. Regarding “client” and “Internet,” Applicant argues and gives examples to support his position and directs the Examiner towards his specification on page 6. The Examiner acknowledges Applicant’s response. The Examiner finds that such examples and arguments are not supported by the express claim language. Moreover, when open-ended examples in the specification are only illustrative, they can not limit claim terms. *Prima Tek II LLC v. Polypap S.A.R.L.*, 318 F.3d 1143, 1150-51, 65 USPQ2d 1818, 1823 (Fed. Cir. 2003) (noting that “[t]he written description makes quite clear that the open-ended examples of ‘floral holding material’ are merely illustrative; that is, they do not exhaustively delineate the ‘floral holding material’ that is clearly defined in the claims.”).

47. In this case, the Examiner finds that Applicant’s arguments are open-ended examples. The Examiner finds that the supposed ‘definitional’ language in his specification and remarks is only exemplary and in accordance with *Prima Tek*, not limiting. Additionally, Applicant’s exemplary statements fail to ‘clearly set forth’ or ‘clearly redefine’ as required by *Bell Atlantic Network Services Inc. v. Covad Communications Group Inc.*, 262 F.3d 1258, 59 USPQ2d 1865 (Fed. Cir. 2001) with the required clarity, deliberateness, and precision. See also *In re Thrift*, 298, F.3d 1357, 1364, 63, USPQ2d 2002, 2006 (Fed. Cir. 2002) (“Although an applicant may be his own lexicographer, nothing in the specification defines the phrase ‘speech user agent’ differently from its ordinary meaning.”) (citations omitted); *Abbott Labs. v. Baxter Pharm. Prods.*, 67 USPQ2d 1191, 1194 (Fed. Cir. 2003) (“Because the patentee did not deviate from the

²⁰ Applicant’s Remarks/Arguments” filed October 6, 2004, Page 19, 1st ¶.

Art Unit: 3627

accustomed meaning of the disputed claim term, the term ‘effective amount’ is construed in view of its ordinary and customary meaning.”).

48. To further support the Examiner’s position, Applicant is reminded that “the unambiguous language of the [] claim controls over any contradictory language in the written description.” *Elekta Instrument S.A. v. O.U.R. Scientific International Inc.*, 214 F.3d 1302, 1308, 54 USPQ2d 1910 1913, (Fed. Cir. 2000) (citations omitted). In this case, it is the Examiner’s factual determination that the claim language of both “client” and “Internet” are—on their face—clearly unambiguous. Furthermore, the varied uses of the terms throughout the specification is not a lexicographic definition since Applicant relies on examples and other indefinite indicators. “Varied use of a disputed term in the written description demonstrates the breadth of the term rather than providing a limited definition.” *Prima Tek*, 318 F.3d at 1151, 65 USPQ2d at 1823 (noting that nothing in *Prima Tek* warranted departing from the general rule in favor of the heavy presumption in favor of the ordinary and custom meaning).

49. Claims 1-19 are nevertheless anticipated and/or obvious because by *amending* the claim language itself, Applicants have *not* resorted to any of the four (4) factors of reading the specification into the claims as articulated in *CCS Fitness Inc. v. Brunswick Corp.*, 288 F.3d 1359, 1366-67, 62 USPQ2d 1658, 1662-63 (Fed. Cir. 2002). In particular, by amending the claims and using the *claims* to define scope and meaning, Applicants have not resorted to lexicography or any of the other three (3) methods of incorporating the specification into the claims. The Examiner concludes that like all the other claim limitations, Applicants are *not* their own lexicographer and “client” and “Internet” are interpreted with their “broadest reasonable interpretation” *Morris*, 127 F.3d at 1054, 44 USPQ2d at 1027.

Art Unit: 3627

50. Regarding lexicography, Applicant is reminded that it is Applicant's burden to define their invention, not the Examiner's.²¹ In complying this burden, Applicant is reminded that it is Applicant—and *not* the Examiner—who drafted the claims, specification, and drawings and it is therefore *Applicant* who must decide whether or not to be his own lexicographer.²² Along the same line of reasoning, whether or not Applicant chose this or that particular method of claim construction (*e.g.* lexicography or perhaps 35 U.S.C. §112 6th paragraph) is also completely within Applicant's discretion.

51. Second, Applicant is reminded that claim terminology is fixed upon filing. See *Middleton Inc. v. Minnesota Mining and Manufacturing Co.*, 311 F.3d 1384, 1389, 65 USPQ2d 1138, 1142 (Fed. Cir. 2002) ("The meaning of a patent term, however, is not subject to revision The meaning of patent terms depends on the usage of those terms in context by one of skill in the art *at the time of application*. [Emphasis added.]"); *Wiener v. NEC Elecs., Inc.*, 102 F.3d 534, 539, 41 USPQ2d 1023, 1027 (Fed. Cir. 1996) ("Ultimately, a court must construe the claim language according to the standard of what those words would have meant to one skilled in the art *as of the application date*. [Emphasis added.]")(overruled on other grounds in *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1454-55, 46 USPQ2d 1169, 1173 (Fed. Cir. 1998) (en banc)); *Plant Genetic Systems N.V. v. DeKalb Genetics Corp.*, 315 F.3d 1335, 1345, 65 USPQ2d 1452, 1460 (Fed. Cir. 2003)("We hold that the district court did not ignore the plain meaning of the claims, but properly gave objective meaning to them as they were understood *at the time the*

²¹ *In re Morris*, 127 F.3d at 1056, 44 USPQ2d at 1029 (quoting 35 U.S.C. §112 2nd paragraph, "It is the applicants' burden to precisely define the invention, not the PTO's.").

²² See *e.g. Lear Siegler, Inc. v. Aeroquip Corp.*, 733 F.2d 881, 221 USPQ 1025, 1031 (Fed. Cir. 1984) (noting that "It is the inventor applying for a patent who is permitted to be his own lexicographer," not the examiner).

Art Unit: 3627

patent application was filed. [Emphasis added.]”); *Kopykake Enterprises Inc. v. Lucks Co.*, 264 F.3d 1377, 1383, 60 USPQ2d 1124, 1127 (Fed. Cir. 2001) (“[W]hen a claim term understood to have a narrow meaning when the application is filed later acquires a broader definition, the literal scope of the term is limited to what it was understood to mean at the time of filing.”); and *In re Bass*, 314 F.3d 575, 577-78, 65 USPQ2d 1156, 1158 (Fed. Cir. 2002) (noting that “Bass chose to define ‘motorized sports boat’ in the specification. He cannot change or modify that definition on appeal.”).

52. So once an applicant files his or her specification, the meaning of *all* claim terms—both lexicographic and non-lexicographic—are fixed. While the meaning may be ‘uncovered,’ ‘corralled,’ or ascertained during either ex parte examination or inter partes litigation,²³ the meaning of claim terms nevertheless remains fixed. It is self evident that failure to construe a claim during either ex parte examination or inter partes litigation does not change the fact that the meaning of claim terms is fixed upon filing. And terms or definitions that actually *change* claim meaning by their inclusion *after* the filing date of the application are improper under either 35 U.S.C. §112 1st paragraph and/or 35 U.S.C. §132 since it is axiomatic that any *change* from an initial meaning would clearly constitute new matter.

53. Third, the Examiner recognizes that drafting patent applications is a complicated process requiring the drafter to consider many complex issues.²⁴ However this does not relieve the

²³ See e.g. *Jack Gluttman, Inc. v. Kopykake Enterprises, Inc.*, 302 F.3d 1352, 1360, 64 USPQ2d 1302, 1307 (Fed. Cir. 2002) (“Where, as here, the patentee has clearly defined a claim term, that definition usually is dispositive; it is the single best guide to the meaning of a disputed term.”).

²⁴ See e.g. *Johnson & Johnston Associates*, 285 F.3d at 1069, 62 USPQ2d at 1241, Newman, J., dissenting (“Patentees often must draw lines in order to claim their invention with specificity.”).

Art Unit: 3627

drafter of deciding whether or not to be their own lexicographer and if affirmative, unequivocally stating those definitions in the specification. Such definitions and associated issues must be contemplated *prior to* filing the patent application. See *Intellicall, Inc. v. Phonometrics, Inc.*, 952 F.2d 1384, 21 USPQ2d 1383 (Fed. Cir. 1992) noting that for lexicography and quoting *Lear*, “the place to do so is in the specification of the inventor’s application, and the time to do so is *prior to* that application acquiring its own independent life as a technical disclosure through its issuance as a United States patent. [Emphasis added.]” *Intellicall*, 952 F.2d at 1388, 21 USPQ2d at 1386.

54. Applicant is also reminded that the USPTO has the authority to set reasonable deadlines or requirements. “The PTO is the administrative agency that is ‘responsible for the granting and issuing of patents’ 35 U.S.C. §2 (2000). Like other administrative agencies, the PTO may impose reasonable deadlines and requirements on parties that appear before it. The PTO has inherent authority to govern procedure before the PTO, and that authority allows it to set reasonable deadlines and requirements for the prosecution of applications.” *In re Bogese*, 303 F.3d 1362, 1367-68, 64 USPQ2d 1448, 1452 (Fed. Cir. 2002) (footnote omitted). Although *Bogese* concerned latches, the concept of imposing reasonable deadlines and requirements upon applicants is pervasive at the USPTO and is generally accepted as a requirement of 37 C.F.R. §1.111(b).²⁵

²⁵ For additional guidance on how the USPTO interprets 37 C.F.R. §1.111(b) see *e.g.*: MPEP §818.03(a) quoting §1.111(b) and noting that applicant is required to point out the supposed errors in the next response by stating *why* the Examiner’s position regarding restriction is *substantively* incorrect in order to preserve his or her right to petition; MPEP §2144.03 regarding Official Notice noting that traversal must be made in applicant’s *next response*. “A seasonable challenge constitutes a demand for evidence made as soon as practicable during prosecution. Thus, applicant is charged with rebutting the well know statement *in the next reply* after the

Art Unit: 3627

55. Having established that claim terms are fixed upon filing, that Applicant is the master of his domain, and that the USPTO can set reasonable deadlines or requirements, the Examiner has simply required that if Applicant *knew of* or *intended* to be his own lexicographer, the Examiner respectfully requested that he point it out now. After the Examiner has brought this issue to Applicant's attention and after the Examiner has shown reliance on the *lack* of lexicographic definition(s) to interpret the claims, Applicant's continued failure to point out any *known* lexicographic definition(s) would be a violation of 37 C.F.R. §1.111(b), and perhaps, Applicant's duty of candor and good faith under 37 C.F.R. §1.56 which states in part: "(a) ... Each individual associated with the filing and prosecution of a patent application has a duty of candor and good faith in dealing with the Office" Issues of quasi-estoppel may also arise. See *e.g. In re Baker Hughes Inc.*, 215 F.3d 1297, 1301, 55 USPQ2d 1149, 1152 (Fed. Cir. 2000) (where the Federal Circuit first discussed quasi-estoppel during a patent prosecution case). In any event, one point however is clear, such comments by Applicant unmistakably confirm that Applicant has received express notice of the Examiner's factual findings and legal conclusions regarding lexicography invocation and has been given the opportunity to defend against the noticed liabilities.

Office action in which the well known statement is made. [Emphasis added.]" Failure to seasonable challenge the official noticed statement *in the very next response* means the statement is interpreted as admitted prior art; and *In re Goodman*, 3 USPQ2d 1866, 1871 (ComrPats 1987) noting the examiners have no authority to waive 37 C.F.R. §1.111(b) and that an applicant is required to point out *any* supposed errors in his next response.

Conclusion

56. Applicant's amendment necessitated the new grounds of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP §706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 C.F.R. §1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 C.F.R. §1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

57. The following two (2) citations to the Manual of Patent Examining Procedure ("MPEP") apply to this Office Action: MPEP citations to Chapters 100, 200, 500, 600, 700, 1000, 1100, 1300, 1400, 1500, 1700, 1800, 2000, 2100, 2200, 2500, 2600, and 2700 are from the MPEP 8th Edition, Rev. 2, May 2004. All remaining MPEP citations are from MPEP 8th Edition, August 2001.

58. Because this application is now final, Applicant is reminded of the USPTO's after final practice as discussed in MPEP §714.12 and §714.13 and that entry of amendments after final is *not* a matter of right. "The refusal of an examiner to enter an amendment after final rejection of claims is a matter of discretion." *In re Berger*, 279 F.3d 975, 984, 61 USPQ2d 1523, 1529 (Fed. Cir. 2002) (citations omitted). Furthermore, suggestions or examples of claim language provided by the Examiner are just that—suggestions or examples—and do not constitute a formal

Art Unit: 3627

requirement mandated by the Examiner. Unless stated otherwise by an express indication that a claim is "allowed," exemplary claim language provided by the Examiner to overcome a particular rejection or to change claim interpretation has *not been addressed* with respect to other aspects of patentability (e.g. §101 patentable subject matter, §112 1st paragraph written description and enablement, §112 2nd paragraph indefiniteness, and §102 and §103 prior art). Therefore, any claim amendment submitted under 37 C.F.R. §1.116 that incorporates an Examiner suggestion or example or simply changes claim interpretation will nevertheless require further consideration and/or search and a patentability determination as noted above.

59. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

60. Also in accordance with *In re Lee*, 277 F.3d 1338, 1344-45, 61 USPQ2d 1430, 1434-35 (Fed. Cir. 2002), the Examiner finds that the Borland's Paradox for Windows User's Guide is additional evidence of what is basic knowledge or common sense to one of ordinary skill in this art. The reference is cited in its entirety. Paradox for Windows User's Guide exemplifies a typical relational database system. Because of the reference's basic content (which is self-evident upon examination of the reference) and after further review of the entire record including the prior art now of record in conjunction with the factors as discussed in MPEP §2141.03 (where practical), the Examiner finds that the Paradox for Windows User's Guide is primarily directed towards those of low skill in this art. Because the reference is directed towards those of

Art Unit: 3627

low skill in this art, the Examiner finds that one of ordinary skill in this art must—at the very least—be aware of and understand the knowledge and information contained within the reference.

61. In accordance with the USPTO's goals of customer service, compact prosecution, reduction of cycle time, and because "the continual, chief complaint of inventors and their lawyers: that patent examiners are abysmal communicators, both orally and in writing,"²⁶ the Examiner has made every effort to clarify his position regarding claim interpretation and any rejections or objections in this application. Furthermore, the Examiner has again provided Applicants with notice—for due process purposes—of his position regarding his factual determinations and legal conclusions. The Examiner notes and thanks Applicant for his "Remarks/Arguments" (beginning on page 6 of his latest response) traversing the Examiner's positions on various points. If Applicant disagrees with any additional factual determination or legal conclusion made by the Examiner in this Office Action whether expressly stated or implied,²⁷ the Examiner respectfully reminds Applicant to properly traverse the Examiner's position(s) in accordance with 37 C.F.R. §1.111(b) in his next properly filed response. By addressing these issues now, matters where the Examiner and Applicant agree can be eliminated allowing the Examiner and Applicant to focus on areas of disagreement (if any) with the goal towards allowance in the shortest possible time. If Applicant has any questions regarding the Examiner's positions or has other questions regarding this communication or even previous communications, Applicant is strongly encouraged to contact Examiner Andrew J. Fischer

²⁶ Chartrand, Sabra, *A Bid to Overcome Patent Backlogs*, 152 N.Y. Times C2 (Sept. 23, 2002).

²⁷ E.g., if the Examiner rejected a claim under §103 with two references, although not directly stated, it is the Examiner's implied position that the references are analogous art.

Art Unit: 3627

whose telephone number is (703) 305-0292. If attempts to reach the Examiner by telephone are unsuccessful, the Examiner's immediate supervisor, Robert Olszewski, can be reached at (703) 308-5183. The fax number for facsimile responses is now (703) 872-9306.

AJ Fischer 12/31/04

Andrew J. Fischer
Primary Examiner
Art Unit 3627

AJF
December 31, 2004